On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF.

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In the Supreme Court of the United States

October Term, 1952.

No. 301.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND WAREHOUSEMEN, LOCAL UNION NO. 41, A. F. L., *Respondent.*

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Question Involved.

Must the National Labor Relations Board produce "substantial evidence" of the fact that "the act of the Union encourage(d) or discourage(d) other employees who *might*[1] learn what had been done."

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[1]Throughout this brief emphasis is supplied unless otherwise indicated.

ARGUMENT.

I.

Congressional history demonstrates validity of lower courts' ruling regarding necessity for "substantial evidence."

During the Wagner Act period there were numerous decisions of various Circuit Courts of Appeal to the effect that there must be some evidence of the "effect" of encouragement or discouragement resulting from intentional discrimination. Those courts held that Section 8 (3) of the original act called for evidence of (1) a "purpose" and (2) an "effect" of encouragement or discouragement of membership within the meaning of that section. A number of those rulings were cited by the 3rd Circuit in *N. L. R. B.* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (see excerpt from that opinion quoted in respondent's original brief at page 25).

In fact, it was the decisions of this Supreme Court and other courts to the contrary and to the effect that evidence of such fact was not required, but instead that the Board by reason of its "expertness" was entitled to assume and infer the fact of discouragement or encouragement—it was precisely such decisions that prompted Congress to amend Section 10 (e) and provide that there must be substantial evidence of such fact. It is often difficult to determine with any certainty just what Congress intended by particular phraseology but in this instance such is not the case. The background for the provision in Sec. 10 (e) of the National Labor Relations Act that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evi-

dence on the record considered as a whole is stated in the *House Conference Report No. 510 on H. R. 3020.*[2]

> "Under the language of Section 10 (e) of the present act, findings of the Board, upon court review of Board orders, are conclusive 'if supported by evidence.' By reason of this language, the courts have, as one has put it, in effect 'abdicated' to the Board. (*NLRB* v. *Standard Oil Co.,* 138 Fed. (2d) 885 (1943)). See also: *Wilson & Co.* v. *NLRB* (126 Fed. (2d) 114 (1942)), *NLRB* v. *Columbia Products Corp.* (141 Fed. (2d) 687 (1944)), *NLRB* v. *Union Pacific Stages, Inc.* (99 Fed. (2d) 153). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (*NLRB* v. *Hearst Publications, Inc.,* 322 U. S. 111; *NLRB* v. *Packard Motor Car Co.,* decided March 10, 1937), or when they rested only *on inferences that were not,* in turn, *supported by facts in the record* (*Republic Aviation* v. *NLRB,* 324 U. S. 793; *LeTourneau Co.* v. *NLRB,* 324 U. S. 793)."
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> "The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. * * * This is not to say that the courts will be required to decide any case *de novo* themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without

[2]Legislative History of Labor-Management Relations Act of 1947, pps. 559, 560.

> adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. *The language also precludes the substitution of expertness for evidence in making decisions.* It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N. L. R. B.* v. *Nevada Consol. Copper Corp.* (316 U. S. 105), and in the Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation, and Le Tourneau, etc., cases, *supra,* without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10 (e) of the amended act."

and in *93 Congressional Record 4560, May 2, 1947,* we find:

> "Mr. Taft: If in the law we require substantial evidence on the entire record, then it seems to be that we not only meet the abuses of the past against employers, but make it infinitely more difficult to use the law improperly against the labor unions."

Notwithstanding the obvious repudiation by Congress of the rationale of the Republic Aviation case, the Petitioner still depends for support of its ruling upon that case and states in its brief that

> "The Court below holds, however, that it is not enough reasonably to infer the consequences from the character of the discrimination; independent evidence must be introduced to establish an actual manifestation of the forbidden effect (R. 93-95). But as this Court has held, in rejecting a contention that 'there must be evidence * * * to show that (conduct) * * * interfered with and *discouraged union organization,*' the requirement of proof necessitates only 'the production of evidential facts'; it does not '*com-*

> *pel evidence as to the results which may flow from such facts.' Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 798, 800. The Board 'may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven,' and the inference drawn carries the authority of a conclusion 'made by experienced officials with an adequate appreciation of the complexities of the subject entrusted to their administration' (*ibid.,* at p. 800)."

The Republic Aviation case, *supra,* concerned the discharge of an employee because he persisted, after being warned of a rule against soliciting of any type, in passing out application cards on his own time in the plant. This Court stated the contention of the Petitioner in that case as

> "The gravamen of the objection of both Republic and LeTourneau to the Board's orders is that they rest on a policy formulated without due administrative procedure. To be more specific, it is that the Board cannot substitute its knowledge of industrial relations for substantive evidence. The contention is that there *must be evidence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization in the circumstances and situation of each company."* 65 S. Ct. 985,

but held that an administrative agency "may infer within the limits of the proven facts such conclusions as reasonably may be based upon the facts proven," and endorsed the Board's expression of its power to indulge in the presumption that a rule prohibiting solicitation "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory. *Re Peyton Baking Company,* 49 NLRB 828, l. c. 843."

Therefore, upholding the Board's claim of authority to presume such facts, this Court also held that this rule discriminated within the meaning of Section 83 "in that it *discourages membership in a labor organization.*" The analogy of the Republic Aviation case with the case now before the Court differs only in that the Board here contends that the conduct complained of "encouraged" membership, which is a difference without a distinction.

A footnote contained in the above quoted portion of Petitioner's Brief contains reference to the assertion by this Court in *Universal Corp.* v. *NLRB,* 340 U. S. 474, 488, that the amended act does not "negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." It appears that this assertion of the Court, while generally true, is, however, in the particular circumstances of this case by its analogy to Republic Aviation precluded by legislative fiat.[3] Further, while footnote 22 in the Universal Camera Corp. case states:

> "The sufficiency of evidence to support findings of fact is *not* involved in the three other decisions of this Court to which reference was made. *NLRB* v. *Hearst Publications, Inc.,* 322 U. S. 111; *Republic Aviation Corp.* v. *NLRB,* 324 U. S. 793."

Such statement appears factually in conflict with the court's outline of the gravamen of Republic Aviation's contention and the statement of facts and conclusions of

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[3]House Conference Report No. 510, *supra.*

law contained in the opinion in that case as heretofore quoted.[4]

II.

Even though the Board may indulge in inference the particular inference in this case is not warranted.

If inferences of the fact of encouragement or discouragement of membership are to be permitted *generally* the Respondent feels that in this matter a much stronger case can be made for the inference that instead of encouraging employees to join the Union, the acquiescence of the employer in the application of Section 45 of Respondent's by-laws would more logically tend to cause employees to refrain from membership. The logic of the latter inference arises from the fact that employees were not compelled to join the Union, and since Section 45 applies only to members, employees realizing that membership involved risk of loss of seniority standing would avoid such risk by abstaining from membership. It is true that such logical argument may appear illogical when contrasted with the usual Union view that all employees should become members of a labor organization. However, the test of whether that argument is or is not logical in the light of the general position of labor organizations, cannot properly be evaluated here, since the record in this case does not contain the facts which motivated a majority of the Respondent's members to adopt the particular by-law in question.

Further, Respondent asserts that in the light of the facts of this case there is no necessity for the Board's

[4] *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 486, 71 S. Ct. 456, 463. This Court had reference to the fact that Congress in the House Report, *supra*, had cited the decisions in the three cases as the type of rulings it was seeking to avert by legislative enactment.

"expertize," but that instead, as member Murdock put it, "common sense, however, tells us that the employee's action would not encourage membership in the Union." It does not require an expert to apply "common sense" to the only possible inference that could arise from the facts in this record.

III.

Petitioner's view of the phrase "membership" as used in the act is unimportant in this case.

Regarding the Petitioner's claim that "membership" as used in the act includes "incidents of membership" such as "good standing" Respondent is not required to answer whether, generally speaking, that might or might not be true, but contents itself with the statement that for the purpose of this case it makes no difference if that be true or false, because here there was *no contract requiring membership of any degree* either good or bad standing. As Petitioner stated in its brief on page 23,

> "Thus, the House Report stated (H. Rep. No. 245, 80th Cong., 1st Sess., 32):
> "* * * if the suspension or expulsion results from anything other than nonpayment of initiation fees and dues * * *, the union may not require an employer to discharge the member *under an agreement * * * making union membership a condition of employment*,"

and again on page 24,

> "The Senate Report states (S. Rep. No. 105, 80th Cong., 1st Sess., 20-20):
> "It is to be observed that unions are free to adopt whatever membership provisions they desire, but that they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or

other job discrimination against, an employee except in the two situations described. Thus, an employee, even though he loses his union membership for reasons other than those set forth, may not be deprived of his job *because of a contract requiring membership* as a condition of employment."

IV.

Right of an employee to refrain from concerted activities mentioned in Section 7 of the act.

The right of an employee to refrain from the activities mentioned in Section 7 of the act is not an "inalienable" right, at least insofar as the ability of the employee himself is concerned. He can, as did the employee in the case before this Court, legally and morally bind himself to waive this right of refraining, and having done so he cannot be heard to complain nor can anyone complain for him.

Respectfully submitted,

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